Supreme Court, U.S.
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No. 09-895

IN THE

Supreme Court of the United States

VR DeANGELIS M.D., P.C., R.T. DOMINGO M.D., P.C., VR DeANGELIS M.D., P.C., TAX MATTERS PARTNER, VINCENT DeANGELIS, JEANETTE DeANGELIS, RODOLFO DOMINGO, BERNADETTE DOMINGO, KEITH DURANTE, KATHLEEN DURANTE, ANTHONY J. CAPIZZI, MARY ANN CAPIZZI,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

The only corporate Petitioners are V R DeAngelis M D , P C and R T Domingo M.D , P C These two entities are S corporations that do not have any parent corporations, and there are no publicly held companies that hold ten percent or more of their stock All other Petitioners are either individuals or a partnership comprised of the S corporations

PETITION FOR REHEARING

Pursuant to Rule 44 2, the DeAngelis Petitioners respectfully petition for rehearing of the Court's March 22, 2010 order denying certiorari in this case Although this Court rarely grants petitions for rehearing, allowing this extremely flawed Tax Court decision to stand without any substantive review from the Court of Appeals or this Court will undoubtedly lead to confusion for federal courts across the country charged with interpreting whether a deduction is an "ordinary and necessary" business expense Without restating arguments advanced in the original petition, this petition for rehearing should be granted because allowing this flawed decision to stand will have dramatic and very negative repercussions for the future of tax law in the United States *See Hickman v Taylor*, *cert denied*, 327 U S 808 (1946), *reh'g granted*, 328 U S 876 (1946), *decided by*, 329 U S 495 (1947), *Boumediene v Bush*, *cert denied*, 549 U S 1328 (2007), *reh'g granted*, 551 U S 1161 (2007), *decided by*, 553 U S 723 (2008) A certification of counsel that this petition is presented in good faith and not for delay, and that the grounds for this petition are intervening circumstances of a substantial and controlling effect and other substantial grounds not previously presented, is annexed

GROUNDS FOR REHEARING

In the jungles of Vietnam during the war, Colonel DeAngelis ran a 440-bed Mobile Army Surgical Hospital (MASH) unit He treated and cared for thousands of young soldiers, and as the Chief Surgeon personally saved countless lives He was also awarded the Silver Star for Valor "Colonel" DeAngelis deserves better than what has been done to "Doctor" DeAngelis in this case Doctor DeAngelis has been deprived of due process and unfairly

mistreated by an obviously flawed, confused, prejudicial, and internally inconsistent Tax Court opinion that was summarily ignored by the Court of Appeals, and perhaps just as casually ignored by this Court as well

This Court must not allow this obviously flawed decision to stand because not only does it fly in the face of 80 years of black letter tax law, it is already being misused, miscited, and mischaracterized by the Commissioner in hundreds, if not thousands, of ongoing tax audits For example, the following cases that are currently in Tax Court, and that have over 40 additional cases coming behind them, have fallen victim to the Commissioner's misuse of the flawed opinion in this case *See, e g , Curcio v Commissioner*, Docket No 1768-07, *Jelling v Commissioner*, Docket No. 1769-07, *Smith v Commissioner*, Docket No 14822-07, *Mogelefsky v Commissioner*, Docket No 14917-07, *McGehee Family Clinic, Inc v Commissioner*, Docket No 15646-08, *Prosser v Commissioner*, Docket No 15647-08

Additionally, this Court should grant the petition for rehearing, vacate the decision of the Court of Appeals, and remand this case to the Court of Appeals for further remand to the Tax Court for a new trial based on the following reasons—all of which demonstrate how Dr DeAngelis and the other Petitioners were clearly denied due process

1 The Commissioner called a single solitary witness in support of his case, a purported expert who, at the time of his testimony, was being sued by the Sponsor and Administrator of the multiple employer welfare benefit plan at the heart of this case – the STEP Plan – for $30 million The lawsuit against the Commissioner's expert continues to this day In fact, this purported "expert" has recently

been retained to testify on behalf of yet another welfare benefit plan that competes against STEP and is very similar to STEP in many ways The Commissioner's only witness in and against Dr DeAngelis had a major conflict of interest then, and has now proven his conflicting opinions can be bought and sold for the right price It is impossible that the Commissioner's expert can now speak favorably of a different welfare benefit plan without further contradicting his already conflicted testimony regarding the STEP Plan in this case

2 Both the Tax Court and the Court of Appeals ignored the congressionally-mandated protection for taxpayers provided in 26 U.S.C § 7491 created by the *Internal Revenue Restructuring and Reform Act of 1998*, PL 105-206, 112 Stat 685, that requires, in all court cases arising from audit disputes after July 22, 1998, that the burden of proof shift from the taxpayer to the Commissioner That was not done in this case as is required by law Not only was that not done in this case, but instead the Tax Court granted the Commissioner's motion to strike the taxpayers' motion to shift the burden of proof to the Commissioner This failure of due process is an abuse of discretion that requires remand under this Court's powers and supervisory administration of the lower courts As such, this case provides the Court an excellent opportunity to review the parameters of congressional protection provided to the taxpayer by Section 7491, which is an issue of first impression for this Court

3 Similarly, the nebulous and extremely vague rules and regulations under 26 U S C § 419A(f)(6) should be reviewed by this Court Petitioner is only one of a thousand victims of the Commissioner's internally inconsistent rules and regulations applied to multiple employer welfare benefit plans as described under Section 419A(f)(6) This

case would have afforded the Tax Court and the Second Circuit a valuable opportunity to rule on the legitimacy of the Commissioner's flawed regulations under Section 419A(f)(6) Unfortunately, the decision here skirted and dodged all of the relevant tax issues presented and instead made up a minutiae-laden fairy tale that is not supported by the facts of this case or 80 years of black letter tax law

4 Finally, if allowed to stand, the decision in this case will effectively repeal all congressionally provided deductions for small businesses in the Tax Code because the Commissioner claims that *DeAngelis* stands for the principle that if a taxpayer wants to take a deduction for the contribution to a welfare benefit plan under 26 U S C § 162(a), 26 C F R § 1 162-10, or 26 U S C § 419(b), then the tax deduction will be denied simply because of the taxpayer's desire to make the contribution with tax-deductible dollars as allowed by the Commissioner's own booklet – *Treasury Publication 535, Business Expenses* – that is readily available on the Internet There are no less than seven listings of tax deductions for the purchase of insurance in the IRS booklet and several authorizing the deduction for contributions made to a welfare benefit plan It is an outrageous violation of fairness and equality under the law that the deduction was allowed for Quinn the Office Manager and millions of other Americans, but not for "Colonel" and now "Doctor" DeAngelis and the Petitioners

A highly respected doctor awarded the Silver Star by his country for valor under enemy fire deserves better from the Federal Courts than silence in the face of the overwhelmingly clear error in the Tax Court opinion and the national significance of these issues to all taxpayers

CONCLUSION

The Court should grant this petition for rehearing from the denial of certiorari

Respectfully submitted,

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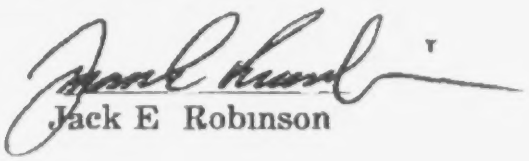
CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44 2 of the Rules of the Supreme Court and is presented in good faith and not for delay



Jack E Robinson